B.C.D. 06-15

EMPLOYER STATUS DETERMINATION
American Orient Express Railway LLC
American Orient Express Railway Company, Inc.
AOE Equipment Company
AOE Rail Services

APR 18 2006

This is the decision of the Railroad Retirement Board on reconsideration of the status of American Orient Express Railway LLC and American Orient Express Railway Company, Inc., as covered employers under the Railroad Retirement Act (RRA) (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. § 351 et seq.) hereinafter sometimes referred to as "the Acts". This is also the initial determination of the Railroad Retirement Board concerning the status of AOE Equipment Company and AOE Rail Services as covered employers under the Acts.

I. Course of proceedings.

In Board Coverage Decision No. 01-20, dated February 9, 2001, the members of the Railroad Retirement Board determined that American Orient Express Railway LLC (AOE Railway) was a covered sleeping car company employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1995, and was consequently required to file returns of compensation and service of its employees under both Acts, and to pay to the Board contributions assessed under the Railroad Unemployment Insurance Act.

AOE Railway filed a timely request for reconsideration of the initial coverage decision on July 13, 2001, and requested a hearing on its appeal. On February 6, 2002, the Secretary to the Board notified the appellant that the Board had appointed a Hearings Examiner pursuant to agency regulations at 20 CFR 258.1, to take evidence and testimony in the appeal, and to prepare a report to the Board recommending a decision. Notice of hearing was published in the Federal Register on May 13, 2002. See 67 Fed. Reg. 32071. A hearing was held on May 21, 2002, in the headquarters building of the Railroad Retirement Board in Chicago. Mr. Robert Bergen appeared on behalf of appellant, and Ms. Elizabeth A. Schellberg appeared as witness for appellant. Prior to commencing the hearing, the Hearings Examiner and Mr. Bergen executed a previously negotiated Joint Statement of Facts Not In Issue, which was admitted as Exhibit 46. During the course of the hearing, appellant submitted Exhibits 47 through 59. The Board presented no witnesses and introduced no additional documents. On June 12, 2002, the Hearing Examiner furnished appellant a copy of the transcript of the hearing, and closed the administrative record.

On May 16, 2003, the Hearing Examiner filed a report to the Board on the record compiled in the matter of reconsideration of B.C.D. Number 01-20. The report contained the Hearing Examiner's findings of fact, conclusions of law, and his recommendations as to the decision to be made by the Board based on the record compiled. The Hearing Examiner's report also included an analysis of the evidence of record and the statutory and case law in support of his recommendations. The report recommended that the Board find on reconsideration that AOE Railway is a covered employer under the Acts, but as a rail carrier employer rather than as a sleeping car company.

On July 21, 2003, AOE Railway submitted a series of exceptions to the Hearing Examiner's Report. While the question of adopting the Examiner's report was pending before the Board, on December 19, 2003, AOE Railway requested that the Board stay reconsideration of B.C.D. 01-20 while AOE Railway filed a request for a declaratory order with the Surface Transportation Board on the question of the company's status as a rail carrier subject to the jurisdiction of that agency. As the basis for the Hearing Examiner's recommendation was his interpretation of the Interstate Commerce Act as applied to AOE Railway, the Board by letter dated January 14, 2004, agreed to stay further consideration until July 1, 2004.

AOE Railway filed its petition to the STB on April 30, 2004, and the STB instituted a proceeding on June 23, 2004. See: American Orient Express Railway Company LLC—Petition for Declaratory Order, STB Finance Docket No. 34502, 69 Fed. Reg. 35130 (June 23, 2004). At AOE Railway's request, the Board granted an extension of the stay of its decision on reconsideration by letter of July 1, 2004, and another extension of the stay by letter of August 30, 2005. The STB rendered its decision on December 27, 2005, holding AOE Railway to be a rail common carrier subject to 49 U.S.C. 10501(a).

II. Status of American Orient Express Railway LLC

Our stay of reconsideration of B.C.D. 01-20 ends with the issuance of the decision by the STB in Finance Docket 34502. But for that STB decision, the matter before us would be whether to adopt any or all of the findings of fact and conclusions of law by our Hearings Examiner in his May 2003 report upon the administrative record compiled in this case, in light of the exceptions thereto filed by AOE Railway in July 2003. See regulations of the Board at 20 CFR 258.6(c). However, our initial decision in B.C.D. 01-20, the Hearings Examiner report, and the exceptions to the report filed by AOE Railway, are all predicated upon whether AOE Railway would be a rail common carrier subject to the jurisdiction of the STB in the absence of a ruling by that agency on the question. A threshold issue is

the effect to be given the declaratory decision by the STB on the question of the status of AOE Railway under the Acts administered by the Board.

Section 1(a)(1) of the RRA (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered rail carrier employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

Section 1 of the RUIA contains essentially the same definition, as does section 3231(a) of the Railroad Retirement Tax Act (RRTA) (26U.S.C. § 3231(a)).

When deciding whether employment is performed for an employer covered by these provisions of the RRA and RUIA, the Board routinely relies on the determination by the STB that a company is a rail carrier subject to subpart IV of Title 49, U.S.C. The Board has on occasion relied on a decision to the contrary when making its determination that employment is not to be credited under the RRA and RUIA as well. See, e.g. B.C.D. 96-59 *Port of Palm Beach District Railroad*, (finding a port authority not a rail carrier on the basis of a decision by the former ICC); and B.C.D. 04-22, *H & M International, Inc.* Decision on Reconsideration (finding an intermodal switching operation is not a rail carrier based on a decision by the STB).

The *H & M International, Inc.* case directly addressed the effect of a declaratory STB order upon the Board's determination of rail carrier employer status. The switching operation in *H&M International,* which the Board held initially to be a covered employer, had obtained a ruling by the STB that it was not a rail carrier subject to Title 49 U.S.C., and then asked the Board to reconsider its initial determination in view of the STB decision. The Board's reconsideration decision noted that the RRA and RUIA place solely with the Railroad Retirement Board the authority for determining the status of a company as an employer covered for purposes of establishing benefit entitlement for employees of that company, and for purposes of collection of contributions due under the RUIA from that company with respect to its employees. The Board also recognized, however, that to reach another conclusion based on the same facts would create an undesirable image of conflict within the Government. The Board therefore concluded that it should carefully weigh a decision by the STB regarding the status of a company as a rail carrier when considering whether that company is a rail carrier employer under the Acts we administer. In this case, the Board will review the STB decision with respect to AOE Railway, and accept the STB

conclusion for purposes of coverage under the RRA and RUIA if it accords with the evidence before us as well.

The STB decision in Finance Docket No. 34502 summarized the evidence before that agency regarding AOE Railway as showing that the company sells tickets to customers who purchase four, seven, and ten day vacation excursions on restored vintage railroad coaches. The excursions are offered seasonally, are one-way trips, are not made over set routes, and may be cancelled if a minimum number of customers is not reached. At the end of each trip, the customer must find his or her own transportation home.

AOE Railway contracts with the National Railroad Passenger Corporation (Amtrak) to provide locomotive power, train and engine crew, and to obtain trackage use rights. AOE Railway proposes itineraries in advance to Amtrak, which then determines whether that specific itinerary may be obtained based upon Amtrak's own passenger schedule and the schedule for freight traffic of the rail carrier which owns or operates the track. Amtrak must approve the itinerary before AOE Railway may offer it, and Amtrak has the right under the contract to cancel or change routes, stops or entire trips. AOE Railway must provide the car consist in good condition and in time to meet the schedules of Amtrak and the freight rail carrier over the track. Amtrak inspects the passenger car consist, and may refuse to pull cars that fail inspection.

The STB concluded that by engaging in the above-described activity, AOE Railway provides "transportation by rail carrier" on the interstate rail network, and as such is subject to STB jurisdiction under 49 U.S.C. 10501(a). The STB noted that its jurisdiction includes as transportation "a car * * * related to movement of passengers by rail" and services related to that movement. 49 U.S.C. 10102(9). By providing the passenger rail cars and services to the passengers on those cars which are related to their movement, the STB found AOE Railway met the definition of "transportation". The STB also noted that the term "railroad" embraces not only road owned and operated directly, but also road operated under agreement. See 49 U.S.C. 10102(6)(B). The STB found AOE Railway's contract with Amtrak to be an agreement to operate a railroad within the meaning of that section. Finally, the STB found that AOE Railway operates as a common carrier by rail. Though serving a niche market, AOE holds itself out to a subset of the public as a common carrier. The STB compared the movement of AOE Railway's food and lodging services to cruise ships or tour bus operators, which have been determined to operate as common carriers. In reaching these conclusions, the STB rejected arguments by AOE Railway that is exempt from STB jurisdiction because it operates as a sleeping car company, a car service or rail car leasing company, or a private carrier.

A majority of the Board finds that the conclusion reached by the STB in its December 27, 2005, decision in Finance Docket No. 34502 is clearly supported on each issue by the evidence before the Board itself as well. Moreover, we note that our Hearings Examiner recommended the same conclusions in his May 2003 report, and discussed the evidence of record, including the transcript of testimony at the May 2002 hearing, which supports those conclusions. Accordingly, a majority of the Board finds on reconsideration that AOE Railway is a rail carrier employer under the RRA and RUIA. Management Member Kever dissents from this finding.

In its reconsideration request, AOE Railway also argued to the Board that it fell within an exception to coverage established by the Board for "tourist excursion railways". The Board established this exception to avoid coverage of small scale passenger operations in the nature of museums or historic attractions. To be exempt from coverage as a rail carrier employer under the Acts, a tourist excursion railroad must carry only passengers, and must establish that it is operated as an amusement and not as part of the national system of rail transportation.1 Evidence supporting a conclusion that a tourist excursion line is not part of the national system of rail transportation includes lack of a physical track connection to the interstate rail network, operation entirely intrastate, operation for only short distances covered in relatively short time periods, and return to point of departure.

In comparison, the scale of AOE Railway operations (e.g., 52 scheduled interstate trips in 2002, excluding the entirely Canadian itinerary) differs significantly from any of the cited "tourist excursion line" Board decisions. Most AOE Railway trips begin in one state and terminate in another and require the passenger to find his or her own way back to the point of departure, or homeward. Moreover, in all cases, the trip runs for several days through several states over hundreds of miles. AOE Railway just does not fit the fact profile of any of the Board's decisions applying the tourist excursion line exception. A majority of the Board finds AOE Railway is not the sort of limited tourist excursion operation which prior Railroad Retirement Board decisions have excepted from coverage under the Acts.

Board Coverage Decision No. 01-20 determined that a single entity, American Orient Express Railway Company LLC, was a covered employer under the Acts

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1 In this regard, the tourist excursion line exemption resembles the statutory test for exempt electric interurban passenger lines found in both Acts. See section 1(a)(2)(ii) of the Railroad Retirement Act(45 U.S.C 231(a)(2)(ii)), and section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C 351(a)).

effective January 1, 1995. The more complete evidence obtained in this appeal establishes that the effective date was incorrect because American Orient Express Railway operated as two successive entities. The limited liability company which was the subject of B.C.D. 01-20 and the STB decision in Finance Docket No. 34502 (American Orient Express Railway Company LLC), was preceded by an incorporated business identified as American Orient Express Railway Company, Incorporated. That corporation incorporated in Oregon on October 24, 1997, and first acquired the passenger rail cars used for its operation through a sales agreement with the prior owners2 of the passenger cars which closed on November 14, 1997. Later, American Orient Express Railway Company LLC assumed operations from the corporation on April 1, 1999. There is no significant distinction between operations conducted by AOE Railway LLC and by its corporate predecessor, AOE Railway Incorporated.

In view of the evidence provided in this appeal, a majority of the Board, Management Member Kever dissenting, therefore finds on reconsideration that American Orient Express Railway Inc. was a rail carrier employer under the Acts effective with the date it acquired the passenger cars from prior owners, November 14, 1997, and ending March 31, 1999. A majority of the Board further finds that American Orient Express Railway LLC became a rail carrier employer under the Acts effective April 1, 1999, the date it assumed operations from the corporation.

III. Status of AOE Equipment Company and AOE Rail Services

In the course of the request for reconsideration of the initial decision regarding coverage of AOE Railway, the appellant submitted information regarding the ownership and operations of a network of companies affiliated with AOE Railway itself. The Hearing Examiner's report recommends that the Board find two of these affiliated companies, AOE Equipment Company and AOE Rail Services, are covered employers by reason of being under common control (through ownership by a common parent company) with AOE Railway, a common carrier by rail, and because they each provide services in connection with railroad transportation. Examiner's Report, pp. 2-3. Given the majority's finding above that AOE Railway is rail carrier employer covered by the Acts, the

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2 The passenger cars were operated for a short time as a joint venture between a Seattle corporation named "Space Explorations" and doing business as "TCS Expeditions"; and a Zurich, Switzerland travel agency named "Reiseburo Mittelthurgau". Given the evidently short and intermittent operation by these entities, and the time which has elapsed since the sale of the cars to the AOE Railway operation which is the subject of this coverage decision, the Board will not address the status of any operation under the name American Orient Express prior to the 1997 transfer to AOE Railway Incorporated.

majority of the Board agrees with the Examiner's conclusion that these two companies are also covered employers. The Board, Management Member Kever dissenting, adopts the findings of the Hearing Examiner with respect to AOE Equipment Company and AOE Rail Services.

As stated by the Hearing Examiner (Examiner's Report, Findings 6, 15-20, and Discussion and Analysis, pp. 70-75), the evidence is that at the time the passenger cars were acquired from prior owners, business was conducted through a group of related corporations. Oregon Rail Corporation (ORC) was formed as a Oregon corporation April 25, 1997, with Henry Hillman as President, Chief Executive Officer, and majority shareholder. ORC in turn formed AOE Railway, Inc., as a wholly owned subsidiary October 24, 1997. ORC also formed AOE Equipment Company, which on November 14, 1997, received title to the passenger rail cars used by AOE Railway Company Inc.

On April 1, 1999, a series of transactions created limited liability companies which assumed some of these functions. Oregon Rail Holdings, LLC,(Rail Holdings) was created as a multi-member limited liability company, with ORC as a company member and Mr. Hillman as manager. Rail Holdings in turn was sole member of newly created AOE Railway LLC, which assumed passenger operations from AOE Railway Inc. as noted earlier. Sometime between April and August 1999 Rail Holdings also created wholly-owned subsidiary AOE Rail Services LLC.

AOE Equipment Company functions only to hold title to the passenger cars used in AOE Railway operations. As of 2002, the company owned at least 16 cars and leased others from Amtrak or other companies. The total included 4 dining cars, 12 sleeping cars, 13 coach cars, 4 lounge or club cars, and various other baggage and crew accommodation cars. Cars leased from Amtrak and refitted by Equipment Company are used exclusively by AOE Railway.

AOE Rail Services LLC (Rail Services) began operations in August 1999 in Englewood, Colorado (a suburb of Denver), on property leased from General Ironworks. In September 2001, Rail Services moved to a facility in Tenio, Washington, leased from "CECO" (possibly an acronym for Cascade Engine Company). The history of both facilities prior to lease by Rail Services is unknown, but the General Ironworks location included an overhead crane used to pick up rail cars to remove the body from wheel trucks. Rail Services works only on passenger cars, providing most interior car maintenance of electrical, plumbing and HVAC systems. Although Rail Services has done some repair work for unrelated entities, the witness at the May 2002 hearing testified this has been

"pretty minimal." When repair work is underway during the AOE Railway off-season, Rail Services employs about 35 people.

Coverage of companies affiliated with a rail carrier employer is provided by section 1(a)(1)(ii) of the RRA (45 U.S.C. § 231(a)(1)(ii)), which insofar as relevant here defines a covered employer as:

* * *

> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more [rail carrier] employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the RUIA, (45 U.S.C.§§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the RRTA (26 U.S.C. § 3231). To meet the definition for coverage of rail carrier affiliates, a company must meet both the common control and the service requirements, and the service must be more than casual.

The "common control" element requires both control, and commonality. The legal standard for the term "control" is set forth at section 202.4 of the regulations of the Railroad Retirement Board as the right or power to direct, either directly or indirectly, the policies and business of a company or person. 20 CFR 202.4. The right or power to control may be by any means, method or circumstance, irrespective of stock ownership. Section 202.5 of the Board's regulations further states that a company is under common control with a rail carrier whenever the control of such company is in the same person, persons, or company as that by which the carrier is controlled. 20 CFR 202.5.

Under the Acts administered by the Board and regulations promulgated thereunder, a non-carrier company is under common control with a rail carrier where the principal shareholder of both companies is an individual, (Livingston Rebuild Center Inc. v. Railroad Retirement Board, 970 F. 2d 295, 296 (7th Cir., 1991)), or where the principal shareholder of both companies is a parent corporation (Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358, 363, (10th Cir., 1942)). Further, if a company is a subsidiary of a parent company, and that parent company itself is a subsidiary of another company, then the first

subsidiary is under common control with other companies controlled by the top-level parent. See B.C.D. 04-64 *American Railroads Corporation*.

The evidence of record is that Rail Services and AOE Railway are wholly owned by Rail Holdings. Accordingly, these two companies are under the common control of Rail Holdings. In addition, Rail Holdings itself is owned by ORC, which also owns Equipment Company, and previously owned AOE Railway Inc. Because ORC controls Equipment Company and Rail Holdings, Equipment Company is therefore under common control with AOE Railway LLC. A majority of the Board find that both Rail Services and Equipment Company meet the first prong of the definition for a carrier affiliate employer under the Acts. Because Management Member Kever dissents from the majority's finding that AOE Railway is a carrier, he also dissents from the decision that these companies are under common control.

The second step in determining whether a rail carrier affiliate is a covered employer under the Acts is a finding that the affiliate operates any equipment or facility, or performs any service, other than casual service, in connection with the transportation of passengers or property by rail. Regulations of the Board at 20 CFR 202.7 define service or operation in connection with railroad transportation in pertinent part as follows:

> The service rendered or the operation of equipment or facilities * * * is in connection with the transportation of passengers or property by railroad * * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad * * *.

The evidence is that Equipment Company owns or leases all passenger rail cars used by AOE Railway. It hardly needs to be said that these cars are essential to the rail transportation of passengers. Furnishing these rail cars must be "reasonably directly related, functionally or economically, to the performance of obligations" which AOE Railway has undertaken as a common carrier by railroad within the meaning of 202.7 of the regulations. Moreover, in Carland Inc. v. United States, 1995 U.S. Dist. LEXIS 2350, (W. D. Mo., Feb. 14, 1995) the District Court considered a company which provided maintenance of way equipment and specialized rolling stock to an affiliated carrier. The Court found that by arranging financing, selecting and purchasing equipment vital to the railroad's operations, the affiliate performed a service under the Railroad Retirement Tax Act. See also, Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351, (8th Cir., 1957)(operator of office building is covered under

the RRA); and Adams v. Railroad Retirement Board, 214 F. 2d 534, (9th Cir., 1954)(subsidiary furnishing accounting, purchasing, stenographic and other services to rail carrier parent is covered under the RRA). Equipment Company performs a service in connection with railroad transportation.

Rail Services operates a railcar repair shop. The status of a carrier affiliate which operates a railroad rolling stock repair shop has previously been answered in the affirmative by three Courts of Appeals. See: Despatch Shops v. Railroad Retirement Board, 153 F. 2d 644, (D.C., Cir., 1946)(freight car shop covered employer under the RUIA); Despatch Shops v. Railroad Retirement Board, 154 F. 2d 417, (2nd Cir., 1946)(freight car shop covered employer under the RRA): and Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir., 1992)(rebuilder of locomotives and other rolling stock a covered employer under RRA and RUIA). The passenger rail car repair and rebuilding performed by Rail Services is indistinguishable from that performed by Despatch Shops and Livingston Rebuild Center. Even if these cases had not been decided, Rail Services by repairing and reconditioning the passenger cars used by AOE Railway, clearly performs a service which is reasonably directly related, functionally or economically, to the performance of obligations which AOE Railway has undertaken as a common carrier by railroad as defined by regulations of the Board at 20 CFR 202.7. Rail Services performs a service in connection with railroad transportation.

The evidence is that both of these companies perform their functions essentially only for AOE Railway. The service each performs for AOE Railway is not so irregular or infrequent as to afford no basis for inferring the service will not be repeated, and thus is not "casual service". See regulations of the Board at 20 CFR 202.6.

A majority of the Board, Management Member Kever dissenting, therefore finds that AOE Equipment Company and AOE Rail Services LLC have been employers under the Acts. Equipment Company performed its service immediately upon receiving title to the equipment on November 14, 1997, and thus its status as a covered employer begins on that date. Rail Services did not commence performing its services until operations began in August 1999, and thus coverage of Rail Services as an employer under the Acts is effective on August 1, 1999.

Conclusion

American Orient Express Railway Company, Incorporated; American Orient Express Railway Company LLC; AOE Equipment Company; and AOE Rail Services are determined to be employers covered by the Railroad Retirement

and Railroad Unemployment Insurance Acts, and are ordered to submit returns of compensation and payment of contributions in accordance with this decision, as they may be directed by agency staff.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting opinion attached)

AMERICAN ORIENT EXPRESS RAILWAY LLC
DISSENT

Jerome F. Kever, Management Member
Docket Number 03-CO-0038
April 4, 2006

I cannot agree with the Surface Transportation Board's (STB) ruling that American Orient Express Railway LLC (AOE Railway) is subject to their jurisdiction as a rail carrier under Part A, Subtitle IV of Title 49, United States Code. Therefore, I must respectfully dissent from the majority's opinion. In making a coverage determination, the majority opinion notes that the Board should carefully weigh a decision by the STB regarding the status of a carrier when considering whether that same entity is a rail carrier under the Railroad Retirement and Railroad Unemployment Insurance Acts (Acts). The lengthy procedural history of this matter before the STB and the Board reflects the complex legal issues presented. After reviewing, at length, the STB's decision and the Board's Hearing Examiner's Report, I find that AOE Railway is not a covered employer.

Primarily, the STB ruled AOE Railway to be a railroad under the Acts because it "operates road under agreement". This makes reference to AOE Railway's agreement with Amtrak to pull its cars. I cannot agree that AOE Railway's agreement with Amtrak amounts to "the road used by a rail carrier and owned by it or operated under an agreement". Section 49 U.S.C. 10106(6)(B). The STB's analysis is not consistent with the common understanding of operating a railroad nor consistent with typical determinations of being a carrier railroad by the STB or the Board. My reasons for this conclusion are as follows.

Geographic Limitation

Generally, STB decisions finding an entity to be a rail carrier under its jurisdiction specify geographic territories encompassing the rail carrier's limits of authority. Normally, mile post numbers or territorial subdivisions of the track are used to define the carrier's limits. In the decision at hand, there is no such delineation by the STB in declaring AOE Railway to be a rail carrier having operating authority under their jurisdiction. In fact, it would appear that AOE Railway has been given unlimited jurisdiction similar to Amtrak in its ability to move passengers. This certainly could not be the intent of the STB, since only Amtrak has exclusive statutory authority under 49 U.S.C. § 24308 to compulsory access over freight carriers trackage for intercity passenger service. To the contrary, AOE Railway is able to move its cars only by contracting with Amtrak and utilizing Amtrak's operating agreements with the freight railroads. Prior to the STB's decision, AOE Railway would arguably have had no rights to demand any access over any trackage, with the authority AOE Railway may have rights that would be inconsistent with Congress's expressed intent of making Amtrak the primary intercity passenger service.

Operating Agreements

Normally, parties to railroad operating agreements include railroad track owners and operating carriers. In some cases the track owner also has STB operating authority, and in most cases the

operating entity will also seek STB authority. The agreement between the track owner and operator includes requirements about track maintenance, safety, and service levels. In many cases, the track owner maintains the right to take over operations if the operating carrier is in default of the operating agreement. Again, the operating agreement references exact locations of track to be operated. A typical operating agreement for passenger service would include these provisions plus those tailored for moving passenger cars and utilizing stations or other facilities. Operating agreements can exist in the situation where a passenger railroad desires to operate over tracks owned by a freight railroad and visa versa. In either instance the agreements contain some of the same elements as previously described.

The situation in AOE Railway is different in many respects. First, AOE Railway has never sought from Amtrak operating rights, as is typically seen in freight or passenger operating agreements. In fact, AOE Railway cannot operate the railroad itself since it does not own any track nor the equipment to run the trains. AOE Railway does not have the ability to maintain the tracks or dispatch. These are key indicia for operating a railroad. Instead, AOE Railway must rely upon Amtrak to move its cars on Amtrak's tracks or on other roads for which Amtrak has operating rights. AOE Railway can only request that Amtrak move its cars on specified routes by agreement. Even there, AMTRAK can reroute or cancel the movements. AOE Railway simply does not have operational control over a railroad. It must depend on Amtrak for movement, dispatching, maintenance and trackage rights.

Rail Carrier Rights and Obligations Under STB Jurisdiction

Since the STB exempted AOE Railway only from application for authority pursuant to 49 U.S.C. 10502, AOE Railway is subject to the remainder of STB's regulatory requirements. First, AOE Railway would need permission from the STB to completely abandon service, including permission to abandon certain areas of service or tourist routes. For example, would a person in Washington, DC be able to seek remedy if AOE Railway ceased operation of its usual train tour from Washington, DC to New Orleans? Also, could AOE Railway be subject to rate claims similarly to freight carriers? Finally, would AOE Railway, as a rail carrier under STB's jurisdiction, be able to seek rights under 49 U.S.C. § 11102 concerning use of terminal facilities?

These incongruities suggest that AOE Railway should never have been found to be a rail carrier under the jurisdiction of the STB. For these very same reasons, I cannot find AOE Railway to be a carrier covered under our Acts. If AOE Railway is not covered, then its affiliated entities would also not be covered.

Original signed by:

Jerome F. Kever
Management Member
4/4/06